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Supreme Court of the United States

OCTOBER TERM, 1970

No. 862

MARION LAGERQUIST, RICHARD B. HARDING, GARLIE ALLEN BLACK, MICHAEL ROSS, LOUIS BURELL PITTMAN, WALLACE LEE CAMPBELL, JR., ROBERT J. HOWELL, JAMES CLAUDE GOODMAN, WILLIAM GLENN YOUNGINER, O. L. HAYDEN AND GEORGE TURNER, PETITIONERS,

versus

THE STATE OF SOUTH CAROLINA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

PAGE

Opinion Below 1

Jurisdiction 1

Questions Presented 2

Statement 2

Argument 2

Conclusion 5

INDEX TO APPENDIX

Norris v. South Carolina, No. 13,085 (4th Cir. April 9, 1969) (Mem. Dec.) 9

CITATIONS

	Page
Dowd v. United States, 340 U. S. 206 (1951)	2
Newsom v. Peyton, 341 F. (2d) 904 (4th Cir. 1965)	3
Newsom v. Commonwealth, 207 Va. 844, 153 S. E. (2d) 235 (1967)	3
United States ex rel. Smith v. McMann, 417 F. (2d) 648 (2d Cir. 1969)	3
Byrd v. Smith, 407 F. (2d) 363 (5th Cir. 1969)	3
People v. Callaway, 24 N. Y. (2d) 127, 247 N. Y. S. (2d) 128 (1969)	3
Coffman v. Bomar, 220 F. Supp. 343 (M. D. Tenn. 1963)	3
State ex rel. Banach v. Boles, 147 W. Va. 850, 131 S. E. (2d) 722 (1963)	3
Hyler v. United States, 402 F. (2d) 558 (5th Cir. 1969)	4
Norris v. South Carolina, No. 13,085 (4th Cir. April 9, 1969) (Mem. Dec.)	4
United States v. Ewell, 383 U. S. 116 (1966)	4
Harrison v. United States, 387 F. (2d) 203 (1967)	4
Beavars v. Haubert, 198 U. S. 77 (1905)	4

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OPINION BELOW

The opinion of the South Carolina Supreme Court (App. C of Petition) is reported at 254 S. C. 501, 176 S. E. (2d) 141.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

I

Does the speedy trial guaranty of the Sixth Amendment to the United States Constitution extend to state appellate procedure?

II

Is delay in obtaining appellate review a denial of due process of law and equal protection of the laws when no prejudice results therefrom?

STATEMENT

The respondent would respectfully refer the Court to the facts as found by the Court of General Sessions, Greenville County (Petition, App. A), and the opinion of the Supreme Court of South Carolina, *State v. Lagerquist, et al.*, 254 S. C. 501, 176 S. E. (2d) 141 (Petition, App. C).

In addition the respondent would show the Court that the appeal on the merits in the instant case was argued before the Supreme Court of South Carolina on January 12, 1971. A decision has not yet been rendered by that court.

ARGUMENT

It is submitted that review on certiorari is unwarranted in the instant case. Although this Court has never specifically ruled on the applicability of the Sixth Amendment speedy trial guarantee to appellate procedure it has considered the question of appellate delay and has held it to come within the scope of the Fourteenth Amendment. *Dowd v. United States*, 340 U. S. 206, 71 S. Ct. 262, 95 L. Ed. 215 (1951). In *Dowd* this Court held also that where there has been a violation of the equal protection guarantees of the Fourteenth Amendment the proper remedy would be for the state to allow appellate review on the merits of the conviction. Such was the effect of the ruling

of the South Carolina Supreme Court in the instant case. That court acknowledged that due process and equal protection govern appellate procedures but found that the delay was neither arbitrary nor purposeful and that it did not prejudice petitioners' right of appeal.

The decision in the instant case is consistent with the cases of other jurisdictions. In *Newsom v. Peyton*, 341 F. (2d) 904 (4th Cir. 1965) the petitioner had been denied his right to counsel for purposes of appealing to the Supreme Court of Virginia. The Court specified that the judgment should not be vacated unless the state supreme court would not hear the appeal and a retrial was unavailable. It is interesting to note that the lapse of time between the conviction and that case was nearly twelve years. See, too, *Newsom v. Commonwealth*, 207 Va. 844, 153 S. E. (2d) 235 (1967) in which the Supreme Court of Virginia heard the appeal some fourteen years after conviction and affirmed.

Assuming, *arguendo*, that the delay had resulted in a denial of certain rights of the petitioners such would "not require that a verdict be upset . . ., but only that the state should allow the completion of appellate review. . . ." *United States ex rel. Smith v. McMann*, 417 F. (2d) 648, 655 (2d Cir. 1969); See *Byrd v. Smith*, 407 F. (2d) 363 (5th Cir. 1969); *People v. Callaway*, 24 N. Y. (2d) 127, 247 N. Y. S. (2d) 128 (1969). In *Coffman v. Bomar*, 220 F. Supp. 343, 349 (M. D. Tenn. 1963) the Court, in reversing a conviction because the defendant's right to appeal had been frustrated, acknowledged that had an appeal still been available under state procedure the proper remedy would be to allow the completion of appellate review. See also *State ex rel. Banach v. Boles*, 147 W. Va. 850, 131 S. E. (2d) 722, 728 (1963). "Merely because [their] personal rights may have been denied in the context of criminal proceedings, the accused [are] not automatically excused from

the penalties imposed by the law for [their] wrongdoing." *Hyler v. United States*, 402 F. (2d) 558, 560 (5th Cir. 1969).

It is submitted that "there is no absolute right to a speedy appeal. . . ." *Norris v. South Carolina*, No. 13,085 (4th Cir. April 9, 1969) (Mem. Dec., a copy of which is submitted as an Appendix). Assuming, however, *arguendo*, that the speedy trial guarantee of the Sixth Amendment and the cases thereunder were applicable to appellate procedures the outcome of the instant case would remain unaffected. The delay was neither purposeful nor oppressive in a constitutional sense. See *United States v. Ewell*, 383 U. S. 116, 86 S. Ct. 773, 15 L. Ed. (2d) 627 (1966). And although unfortunate, the delay was not, under the circumstances, so unduly long to in itself constitute a violation of the Sixth and Fourteenth Amendments. The right to a speedy trial "is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." *Harrison v. United States*, 387 F. (2d) 203, 206-207 (1967) quoting from *Beavers v. Haubert*, 198 U. S. 77, 87, 25 S. Ct. 573, 49 L. Ed. 950 (1905).

Furthermore, the petitioners made no application to the court for an order requiring that the record be transcribed more promptly.

And finally, the petitioners' right of appeal has not been frustrated. Since the filing of the Petition in the instant case the appeal on the merits has been argued before the Supreme Court of South Carolina. (January 12, 1971). The appeal, of course, was based solely on the record below. Unlike a trial the problems of fading memories and unavailable witnesses were nonexistent. The petitioners' appeal was not prejudiced.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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State of South Carolina,
Counsel for Respondent.

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 13,085

MALVIN E. NORRIS, APPELLANT,

versus

STATE OF SOUTH CAROLINA, COUNTY OF GREENVILLE, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AT COLUMBIA

MEMORANDUM DECISION

Malvin E. Norris, a South Carolina prisoner, seeks to appeal a denial by the District Court (Hemphill, J.) of his "Petition for the Issuance of Writ of Mandamus."

A jury convicted Norris of murder and he received a life sentence on December 5, 1966. In his petition, he complained that, although he filed a timely Notice of Intention to Appeal and a request for the appointment of counsel, counsel was not appointed for more than a year afterward and the appeal has still not yet been prosecuted, some two years now having passed since his conviction. He alleges that a *habeas corpus* petition filed in the Greenville County Court of Common Pleas complaining of the delay has been ignored and that his petition for a writ of mandamus directed to the South Carolina Supreme Court seeking to compel a speedy handling of the appeal was dismissed. He therefore contends that he has been denied a prompt appeal and prays that a writ of mandamus be issued to require the state to speedily hear his appeal. He further contends

that he should be deemed to have effectively exhausted his state remedies because of the delay and that the federal courts should now "assume jurisdiction" of his claim.

As there is no absolute constitutional right to a "speedy appeal," Norris is not entitled to the writ of mandamus. However, treating the petition as one seeking *habeas corpus* relief, the District Court improperly dismissed the petition for failure to exhaust state remedies. This court has repeatedly held that long delays by the state in determining a petitioner's claims may "justify a federal court in not requiring exhaustion on the ground that such delays make state remedies ineffective to protect the rights of the prisoner." *Strouth v. Peyton*, 404 F. (2d) 537, ... (4th Cir., Oct. 18, 1968). In *Martin v. Peyton*, No. 11, 646 (4th Cir., March 11, 1968) (Mem. Dec.), we reversed a district court's decision that petitioner had failed to exhaust where there had been an unexplained delay of five months in which no action was taken on his *habeas corpus* petition in a state trial court. Holding that an "[u]nreasonable delay in the processing of state remedies may require a federal court to consider federal claims without first relegating the *habeas corpus* petitioner to recourse in the state courts," we remanded for a determination whether, in fact, action on the petition had been unreasonably delayed.

Accordingly, we remand this case for a determination whether the delay of two years in the processing of Norris' direct appeal has been unreasonable. If this long delay cannot be satisfactorily explained, the District Court is directed to allow Norris to amend his petition to raise any federally cognizable claims he may have relating to his conviction and to consider these claims on their merits.

A certificate of probable cause is granted, the order of the District Court is vacated, and the case is remanded for further proceedings consistent with this opinion.

/s/ SIMON E. SOBELOFF,
United States Circuit Judge.

/s/ HERBERT S. BOREMAN,
United States Circuit Judge.

/s/ ALBERT V. BRYAN,
United States Circuit Judge.

Filed:
April 9, 1969.

SAMUEL W. PHILIPS,
Clerk.